September 19, 2004

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Re: ***Robert Smith v.Thau-Hsiung & Hsian-June Liu Hwang and Amir & Nooshin Azartouz***
C.A. No. 2004-09-128

Date Submitted: August 22, 2005
Date Decided: September 19, 2005

LETTER OPINION

Dear Gentlemen.:

Trial in the above captioned matter took place Monday, August 22, 2005. Following the receipt of evidence and testimony the Court reserved decision. The Court ordered post-trial briefing on the affirmative defense raised by defendants: statute of limitations.

The parties filed legal memoranda on the issue of whether Plaintiff's Exhibit 1 was a contract under seal which would not be controlled by a three year statute of limitations. 10 *Del. C.* §8106. Second, the parties also addressed the issues of costs and counsel fees as submitted by Letter Motion by Rick S. Miller, Esquire. *See:* Miller Affidavit and Motion on Attorney's Fees. The record is now complete and ripe for decision. This is the Court's final Decision and Order.

I. THE FACTS

Robert C. Smith ("Smith") was sworn and testified. In March 1988 with co-defendants Smith met and decided to form American Fabricators, Inc. ("Fabricators"). Defendants had

approached him and inquired if he was interested in going into business and each co-defendant would put up $5,000.00 cash towards investment as a start-up cost. Fabricators was a steel construction business and each party, including the plaintiff and co-defendants were 25% stockholders. According to Smith, Frank Hwang handled all the finances and controlled the company and otherwise ran the business and "kept the business". Plaintiff was the President of the company and co-plaintiff Geraldine Smith was the Secretary of the corporation. Cliff and Amir Azartouz were engineering background investors and were also involved in the operation of the business, but not office of the corporation.

Fabricators began in earnest in 1988 and fabricated steel and other industrial piping and steel work for the local community. In 1990 the company fell into "hard times" according to Smith and filed Chapter 7 Bankruptcy. Thereafter the company was dissolved. According to Smith the proceeds left over from the bankruptcy were sold to pay off taxes and bills owed to the Bankruptcy Trustee.

Plaintiff's Exhibit 1 was moved into evidence. The document is an Indemnity Agreement signed by plaintiff and all co-defendants. According to Smith, Dan Losco instructed Smith to prepare the document. It was presented at a meeting of the owners and signed by the plaintiff and co-defendants. Under paragraph 4 of the agreement Tang's, Hwang's and Azartouz's joint and several liability would "be limited to 75% of all judgments, liens, awards, penalties, fines, costs, liability, out-of-pocket expenses or losses of any nature whatsoever which arise or may arise at any time as a result of an action or inaction taken on behalf of the Corporation by Indemnitees in their capacity as Directors, Officers, Shareholders or Employees of the Corporation."

Plaintiff's Exhibit 2 was moved into evidence at trial without objection. It is a notice from the Internal Revenue Service ("IRS") indicating taxes due on behalf of Fabricators. At the

time of the notice, May 30, 2000, the amount due was $14,520.76. The tax liability arose, according to Smith, because of the problems with cash flow and the company's decision, primarily made on his behalf to pay creditors and employees before taxes were paid to the IRS. According to Smith, Frank Hwang would write the checks at the corporate meetings and the company would hold back payments to the IRS as taxes due. He testified at trial he understands it was the corporate responsibility to pay taxes. Since the notice by the IRS, he has personally paid these monies back to the IRS and seeks these monies as a judgment against co-defendants as part of the Indemnity Agreement and the instant lawsuit.

Smith indicated the IRS filed claims against Fabricators, in Chapter 7 Bankruptcy proceedings. The original claim was $14,520.76. The IRS also intercepted and collected a tax refund, in part to pay off that judgment, and also garnished his wages on January 18, 2003. On April 15, 2001 $1376.00 of his federal tax refund was intercepted. The IRS subsequently garnished $400.00 a month or $200.00 every two weeks from his current salary as scheduled assessments due as part of tax monies owed.

Plaintiff's Exhibit 3 was moved into evidence. This is a hand written notation of what Smith believes he is due in owing from co-defendants. The total amount is $16,837.95 or $4,209.48 each. A prior owner of the corporation has paid his share and therefore he seeks from co-defendants $4,209.15 each. He has contacted all three shareholders who are co-defendants in this action and asked respectively for their "one quarter share". Tang has paid him $4,209.40 and therefore is not a party to this lawsuit.

Smith claims in the instant civil action that Frank Hwang and Amir Azartouz owe him $4,209.15 each as provides to the Indemnity Agreement.

On cross-examination Smith testified that he was offered by defendant a start-up agreement to form another company which co-defendants claim was the "*quid pro quo*" or

consideration for payment of these monies which are the subject of this action. Smith indicated that the co-defendant husbands were originally the shareholders but the stock-holder agreement and stock certificates were amended and the wives became listed as owners. Smith does not recall the reason behind the changing of the names of the stockholders to be placed in the wives names. Smith also conceded on direct that when he was President of American Fabricators, he was the only officer.

On further cross-examination Smith could not explain why the Secretary of the corporation, his wife, refused or failed to sign the Indemnity Agreement. Smith could not explain why the respective witnesses did not attest the signatures of the co-owners and original investors who are co-defendants in this action when the Indemnity Agreement was executed. According to Smith, his wife Geraldine Smith refused to sign the Indemnity Agreement as Secretary. (Plaintiff's Exhibit No.: 1).

Smith denied on May 23, 1988 that he received a personal loan as consideration for the repayment of the monies disputed in the Indemnity Agreement, but instead indicated they were "start-up costs for the corporation" and therefore owed to him.[1]

Smith also agrees at trial that he was withholding IRS payments but contends he did so with all the partners' knowledge and consent who are co-defendants in this action. After the Chapter 7 bankruptcy the IRS approached him to collect the debt and the bankruptcy was subsequently filed in approximately 1997. Smith contends he also paid interest to the IRS.[2]

Defendant's Exhibit 7 was moved into evidence without objection. The IRS apparently demanded in this letter full payment and made an offer to him to pay installments to satisfy the balance due. Smith testified at the time he could not afford the installments.

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[1] Defendant's IDD was used to refresh his recollection and Smith disagreed about the equipment listed on page 3 which were allegedly *quid pro quo* or consideration for an alleged loan.
[2] Thereto See Plaintiff's Exhibit No.: 3.

Defendant's Exhibit 11 was received into evidence dated October 24, 1996 which was a "Final Order". This was a letter from the IRS which came after the bankruptcy proceedings requesting full payment in 1997, eight years ago.

Smith concedes it took seven years to bring the instant lawsuit.

The defense presented its case-in-chief. Thau-Hsuing Hwang, also known as Frank Hwang ("Hwang") testified at trial. He is not an attorney, but is a previous investor with the plaintiff and the co-defendants in this civil action. He incorporated Fabricators with the plaintiff, although he is not a corporate officer. During the -three years Fabricators was in business he "made a lot of money" and did piping and mechanical construction work for the local industry. Sales exceeded two million dollars ($2,000,000.00) a year for Fabricators. There were approximately thirty (30) employees. In 1991, according to Hwang the company began to get behind in disbursements and payments to suppliers and employees because of a "weak economy". The Indemnification Agreement, as Plaintiff's Exhibit 1, was proposed at that time. Hwang contends that there was never a stockholder's meeting to discuss the Indemnity Agreement. Hwang testified at trial that he doesn't even remember signing the Indemnity Agreement. He was also unaware or didn't observe the wives actually signing or executing the Agreement.

Hwang agrees the co-defendants and the plaintiff "got together every year" since 1997 and did talk about the agreement.

Hwang believes he doesn't owe the plaintiff any money because of the statute of limitations issue that he asserted in his Answer. Hwang also contends that trucks and other equipment valued in excess of $100,000 and $60,000 respectively were given to plaintiff in exchange for any monies the partners allegedly owed under the terms of the Indemnity Agreement. Hwang also contends that the plaintiff allegedly agreed to pay outstanding claims

due and owing Fabricators to the IRS and/or other debts owed, in response to these equipment disbursements.

Hwang's main contention is that Smith "waited way too long to bring this action." He contends that Smith alone as President and Chief Officer of Fabricators made the decision to defer any payments to the IRS. Hwang contends the action is also time barred.

On cross-examination Hwang contends Smith received the "good will" of Fabricators as a result of a new company the co-defendants assisted him in incorporating. Hwang insists therefore, that these monies are not owed as consideration for that Agreement. Hwang concedes the Agreement was not "ripped up" after this Agreement or offered as a *quid pro quo* or consideration for the equipment which was allegedly given to the plaintiff. Hwang did not ask the Indemnity Agreement to be rescinded as a result of the equipment exchange.

Amir Azartouz ("Azartouz") was sworn in and testified. Azartouz contends AFC Services was a new corporation that co-defendants helped plaintiff incorporate, which is the *quid pro quo* or consideration for the Indemnification Agreement debts allegedly owed by co-defendants. He contends plaintiff agreed to take responsibility of all debts of the corporation in the future as consideration of starting up this new corporation which was transferred, in full, to the plaintiff.

On cross-examination, Azartouz admitted that no written agreement was ever reduced to writing. The witness did not request a rescission as party to the Indemnity Agreement after the incorporation of this new company.

II. THE COMPLAINT AND ANSWER

The essence of this action is Robert Smith and Geraldine Smith's contention in paragraph 5 of the Complaint that they have personally incurred debts to the IRS in the approximate amount of $16,837.95 as a result of the tax liabilities of Fabricators. Under paragraph 7 of the

Amended Complaint, co-defendants are allegedly "liable, jointly and severally, for 75% of the any claim made against the plaintiffs including the IRS debt". According to the Amended Complaint the amount due the plaintiffs from the co-defendants on account of IRS debt is $8,418.90 and judgment should be entered jointly and severally against all co-defendants.

Co-defendants have answered the Complaint. All co-defendants have raised the issue of demand for payment was made by Smith six years ago and respectfully denied. Thau-Hsiung Hwang and Hsian-June Liu Hwang have answered the Complaint and asserted that the statute of limitations of three years ago "also ran out long ago since the IRS sent Mr. Smith the final notice of 'Notice of Intent to Levy' on October 16, 1997." The Hwangs contend that any evidence for an affirmative defense of the case have not been "long gone" as a result of plaintiff's failure to timely file a civil complaint.

III. DISCUSSION AND APPLICABLE LAW

With reference to Plaintiff's Exhibit 1 which was received into evidence, the Court must determine whether this exhibit received into evidence at trial is a binding contact, on its face, or with extrinsic evidence presented at trial constitutes a contract under seal. Second, assuming arguendo Plaintiff's Exhibit 1 meets the definition of a contract under seal, the question is whether the statute of limitation is tolled and the three year statute contained in 10 *Del. C.* §8106 does not apply. Counsel to the plaintiff submitted at trial a legal memorandum and points of authorities and an affidavit for attorney's fees on or about September 9, 2005. Co-defendant Hwang filed his legal memorandum arguing the civil action is time barred and 10 *Del. C.* §8106 applies to the facts of the case. Co-defendant Hwang also asserts costs should not be awarded and no attorney's are authorized by contract or statute. On September 12, 2005 Rick S. Miller, Esquire submitted on behalf of plaintiff, his reply memorandum arguing, *inter alia*, that the three

year statute of limitations set forth in Delaware Code §8106 does not apply because a contract under seal was executed by the parties.

According to case law, the following rules apply to contracts under seal:

> A contract under seal is, like any other contract, an agreement evidencing an intention or promise to accomplish a certain goal. A common law, before the requirement of consideration came into being, contracts affixed with a seal evidencing the solemnity of the promise set forth in the agreement without the necessity of anything more to cement the bargain. FN21 The purpose of the seal was to indicate the sanctity of the promise and identify the promisor during the times when illiteracy was more prevalent. The contract was not only deemed to be evidence of the obligation, but the obligation itself. They 'remained binding unless obliterated or canceled.' FN22 Of the formal contracts that came into being in this manner, contracts under seal, recognizances and negotiable instruments survived in modern times up to and including the present day. F23.
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> FN21. *Black's Law Dictionary*, 326 (6th ed.1990).
> FN22. Arthur L. Corbin, *Corbin on Contracts*, §§10.2 & 10.4 (rev'd ed. 1993).
> FN23. *Id.*
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> In order to form a contract under seal, three elements were required. First, there had to be a writing identifying the parties and defining the promise forming the basis of the contract. Second, the writing had to be "sealed". The seal itself could take any number of forms. Lastly, the document had to be delivered to the obliged. FN24. (Emphasis supplied.)
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> FN24. *Restatement (Second) of Contracts* §95 (1981).
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> In Delaware the determination of whether a contract is "under seal" is a mixed question of law and fact. FN25 Where the mortgages are concerned, the presence of a seal and testimonial clause have been held as proof of the intent to execute a contract under seal. FN26 That treatment originated at common law due to the length and significance of the underlying obligation. FN27 Where the document purporting to be under seal is not a mortgage, more is required than a signed writing with the word "seal" or "sealed" printed or otherwise affixed at or near the signatures of the parties. FN28 In *American Telephone & Telegraph Co. v. Harris Corp.*, Vice Chancellor Jacobs, quoting from the *Aronow Roofing co. v. Gilbane Building Co.,* FN 28 stated:

FN25 *Kirkwood Kim Corp. v. Dunkin' Donuts, Inc.*, Del. Super., C.A. No. 94C-03-189, 1995 WL 411319, 5, Silverman, J. (June 30, 1995).

FN26 *Id.*

FN27 *First Trust Corp. v. Byers,* Del. Ct.Common Pleas C.A. No. 95-05-536, 1997 WL 1737103, 2, DiSabatino, J. (Feb. 25, 1997).

FN28. *Kirkwood,* Del.Super., C.A. No. 94C-03-189, 1995 WL 411319 at 6.

FN29. 902 F.2d 1127 (3d Cir.1990).

***5** ··· In Delaware, for an instrument other than a mortgage to be under seal[:] ··· it must contain language in the body of the contract, a recital affixing the seal, and extrinsic evidence showing the parties' intent to conclude a sealed contract. The mere existence of the corporate seal and the use of the word "seal" in a contract do not make the document a specialty ··· There is simply no manifested intent to create a contract under seal; no language in the body of the contract to suggest that the contract is under seal; and no recital appears before the corporate seal to evidence any intent to create a specialty. FN30

FN30. Del.Super., C.A. 92C-01-27, 1993 WL 401864, Jacobs, V.C. (Sept. 9, 1993).

The Court went on to rule that the license agreement under review, was not "under seal". In discussing the line of cases that required less proof, the Court noted:

> ··· [L]ater decisions of this Court have also held that the pre-printed word "seal" appearing to the right of the signature, was sufficient to qualify the mortgage document as a sealed instrument, rejecting the argument that other evidence of intent such as a wax imprint, pen mark or reference to a seal in the body of an instrument, was also required. (Citations omitted.) But those cases are distinguishable from this one in that they involved mortgages, a special form of instrument that historically and customarily was made under seal. Given the peculiar nature of mortgages, it is not surprising that the Court has required less strict proof of intent to create a sealed instrument where a mortgage was involved than in the case of other instruments. FN31 (Emphasis supplied).

FN31. *American Telephone & Telegraph,* 1993 WL 401864 at 7, n.6.

> The authorities cited above lead to the conclusion that to create instruments under seal other than mortgages, Delaware follows the general trend. However, it is equally apparent that establishing the existence of the elements referred to above is not sufficient. There must also be substantive evidence of the intent of the parties to create a sealed document. FN32 The absence of such evidence will deny sealed status to an ordinary contract. (Emphasis supplied).
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> FN32. *Aronow,* 902 F.2d at 1129.

See, Consolidated Rail Corporation v. Liberty Mutual Insurance Co., 2002 WL 3200503 (Del. Super.,) Tolliver, J. (September 6, 2002).

Under existing case law "there must be substantive evidence of the intent of the parties to create a sealed document." *See Aronov*, 902 F.2d at 1129. According to the Superior Court, "the absence of such evidence will deny sealed status to an ordinary contract." *See, Consolidated Rail Corporation v. Liberty Mutual Insurance Co.*, 2002 WL 3200503 (Del. Super.,) Tolliver, J. (September 6, 2002).

The plaintiffs claim to have incurred a debt in the amount of $16,837.95 to the Internal Revenue Service as a result of the tax liabilities of Fabricators. Plaintiffs have received $4,209.49 from Cliff Tang on account to the IRS debt. Plaintiffs claim in their instant lawsuit argue that according to the Indemnity Agreement that co-defendants are jointly and severally liable for 75% of any claim made against the corporation because of the IRS debt.

The controlling language allegedly of the Agreement is paragraph 4. However, a close review of the extrinsic evidence produced at trial, as well as the missing attestation clauses, and the missing Secretary's signature on the Indemnity Agreement requires the Court to reach the conclusion that the Plaintiff's Exhibit 1 is not a binding contract under seal. Whether a contract is "under seal" is a mixed question of law and fact. *Kirkwood Kin Corp. v. Dunkin' Donuts, Inc.*, Del. Super., C.a. No.: 94C-03-189, 1995 WL 411319, Silverman, J. (June 30, 1995). Where a

document purporting to be under seal is not a mortgage, more is required than a signed writing with the word "seal" or "sealed" printed or otherwise affixed at or near the signature of the parties. *Kirkwood*, Del. Super., C.A. No. 94C-03-198, 1995 WL 411319 at 6. In *American Telephone & Telegraph v. Harris Corp.*, V. C. Jacobs, quoting from *Aronow Roofing Co. v. Gilbane Building Co.*, 909 F.2d 1127 (3d.Cir. 1990)

> In Delaware, for an instrument other than a mortgage to be under seal[:] … it must contain language in the body of the contract, a recital affixing the seal, and extrinsic evidence showing the parties' intent to conclude a sealed contract. The mere existence of the corporate seal and the use of the word "seal" in a contract do not make the document a specialty… There is simply no manifested intent to create a contract under seal; no language in the body of the contract to suggest that the contract is under seal; and no recital appears before the corporate seal to evidence any intent to create a specialty. Del.Super., C.A. 92C-01-27, 1993 WL 401864, Jacobs, V.C. (Sept. 9, 1993).

Thus, it appears that there exists in this record a lack of substantive extrinsic evidence of the intent of the parties to create a sealed document. *Aronow*, 902 F.2d at 1129. According to Superior Court, "the absence of such evidence will deny sealed status to an ordinary contract." At trial, the totality of circumstances indicate that there was not an intention to create a sealed contract. No corporate Secretary signed the Agreement. No witnesses attested the Agreement itself. Co-defendant Want doesn't ever remember signing Plaintiff's Exhibit 1. The Court therefore finds by a preponderance of the evidence no contact under seal was ever entered into between the parties.

The Court must also note that Smith, as President of Fabricators, had full authority to make such a decision to defer payment if there are taxes due to the IRS. The only other officer was his wife who was Secretary of the Corporation. The Court notes that such a decision to not pay binding and legal obligations to the Internal Revenue Service is a decision that Smith unilaterally made as Chief Executive of Fabricators.

IV. ORDER AND OPINION

It is clear that there is considering the mixed question of law, as well as the extrinsic evidence produced at trial, as well as the established case law the Court must conclude that the parties did not intend to enter into a sealed contract by a preponderance of the evidence. Nor does the Indemnity Agreement as written satisfy the law determining such a contract under seal existed.

The provisions of 10 *Del. C.* §8106[3] therefore do apply. The claims for relief in the Plaintiff's Amended Complaint are time barred. Plaintiff's application for attorney's fees is therefore **DENIED**. Each party shall bear their own costs.

IT IS SO ORDERED this 19th day of September, 2005.

John K. Welch
Associate Judge

cc: Rebecca Dutton
CCP, Civil Case Processor

[3] § 8106. Actions subject to 3-year limitation.

No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title.